

1 Carl J. Oreskovich, WSBA #12779
2 ETTER, McMAHON, LAMBERSON,
3 VAN WERT & ORESKOVICH, P.C.
4 618 West Riverside Avenue, Suite 210
5 Spokane, WA 99201
6 Phone: (509) 747-9100
7 Facsimile: (509) 623-1439
8 Email: carl@ettermcmahon.com
9 *Attorney for Defendant Cody A. Easterday*

10 CHIEF JUDGE STANLEY A. BASTIAN

11 UNITED STATES DISTRICT COURT
12 FOR THE EASTERN DISTRICT OF WASHINGTON
13

14 UNITED STATES OF AMERICA,

15 Plaintiff,

16 v.
17

18 CODY ALLEN EASTERDAY,
19

20 Defendant.
21

No. 4:21-CR-06012-SAB-1

**DEFENDANT'S MOTION TO
CONTINUE RESTITUTION
DETERMINATION**

Sentencing Hearing:

October 4, 2022 at 2:30 pm
Yakima, WA

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24 COMES NOW, Defendant Cody A. Easterday, by and through his attorney
25 of record, Carl J. Oreskovich of Etter, McMahon, Lamberson, Van Wert &
26 Oreskovich, P.C., and hereby moves this Court for an Order continuing the
27 restitution determination portion of the Sentencing Hearing in this matter. Mr.
28 Easterday further requests this Motion be heard on an expedited basis.
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1 As explained fully below, Mr. Easterday respectfully requests a
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3 continuance of the restitution portion of his upcoming Sentencing Hearing for
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5 the Court to determine the actual net loss incurred by Tyson Foods in
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7 conjunction with the totality of its business dealings with Mr. Easterday and/or
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9 Easterday Ranches, Inc. *See United States v. Price*, 2020 WL 7647368, at *3
10
11 (D. Mont. 2020) (“[I]n the context of restitution awards, the government’s
12
13 evidence of actual loss must deduct any financial benefit realized by the victims
14
15 of the fraud.”); *accord United States v. Hansen*, 498 F. Supp. 3d 1332, 1344 (D.
16
17 Idaho 2020) (defendant’s company underbilling to victim credited against
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19 restitution as “[t]he intent of restitution is ‘to make victims of crimes whole,’ . . .
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21 and not to give victims of crime a payout”).

22 **BACKGROUND**

23 This Court is scheduled to sentence Mr. Easterday on October 4, 2022.
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25 The accompanying Declaration of Carl J. Oreskovich is hereby incorporated by
26
27 this reference as if restated verbatim herein. As identified in detail in the
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29 accompanying Declaration, Mr. Easterday is requesting a continuance of the
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31 restitution portion of the Sentencing Hearing for full consideration of at least
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three specific offsets in the restitution owed to Tyson Foods in this matter.

1 First, Easterday Ranches, Inc. (“Easterday Ranches”) was never paid by
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3 Tyson Fresh Meats, Inc. (“Tyson”) for certain feed and cattle care services
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5 rendered. (*See* Oreskovich Decl. at ¶ 5.) The amount owed by Tyson is
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7 approximately \$11,970,095.18 and was incurred both pre-Bankruptcy and post-
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9 Bankruptcy. (*Id.*) These amounts were either not disputed by Tyson or Tyson
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has failed to provide adequate details and reconciliation under the accounts.

11 Second, Tyson has collected over \$51,000,000.00 in interest and
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13 guaranteed funds from Easterday Ranches in violation of the Packers and
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15 Stockyards Act of 1921. (*See* Oreskovich Decl. at ¶ 6.) In this vein, Tyson has
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17 maintained that it owned the cattle that were purchased and fed by Easterday
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19 Ranches and collected the above-referenced interest and guaranteed funds from
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21 Easterday Ranches from 2010 to 2020. (*Id.*) Federal Regulations implemented
22
23 under the Packers and Stockyards Act of 1921 indicate: “No packer or dealer
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25 [*i.e.*, Tyson] shall, in connection with the purchase of livestock in commerce,
26
27 charge, demand, or collect from the seller of the livestock [*i.e.*, Easterday
28
29 Ranches] any compensation in the form of commission, yardage, or other
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31 service charge unless the charge is for services mandated by law or statute and is
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not inconsistent with the provisions of the Act.” 9 C.F.R. § 201.98. As such, if
Tyson was the appropriate owner of the cattle, it has clearly violated the Packers

1 and Stockyards Act of 1921 by collecting illegal compensation and other service
2 charges from Easterday Ranches. *See id.*

3
4 Third, Tyson and Mr. Easterday participated in a marketing venture
5 utilizing “Cody’s Beef” for at least seven years and potentially up to eleven
6 years. (*See* Oreskovich Decl. at ¶ 7.) Under this marketing arrangement, Tyson
7 utilized Mr. Easterday’s name and likeness for a branded beef product sold in
8 Japan, in turn agreeing to compensate Mr. Easterday. (*See id.*) Despite utilizing
9 “Cody’s Beef” for at least seven years (program and labeled product
10 commencing around 2010, applying to register the trademark in 2013, receiving
11 the registration in 2014, and maintaining the trademark which is presently
12 active), Tyson has never provided any compensation to Mr. Easterday,
13 accounted for any profits, and has solely retained all revenue arising out of this
14 marketing arrangement. (*See id.*) The amount of associated compensation
15 wrongfully retained by Tyson is approximately \$100,000,000.00. (*See id.*)
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25 Mr. Easterday respectfully requests that the Court consider these three
26 potential offset(s) against the remaining amount of restitution owed in this
27 matter. The Government has taken the position that it will apply any future
28 credits or offsets as directed by the Court. (Oreskovich Decl. at ¶ 10.) The
29 Government has further indicated that it will only object to a continuance or
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1 bifurcated restitution hearing to the extent it delays Mr. Easterday's reporting to
 2
 3 Federal Bureau of Prisons custody (if ordered by the Court). (*Id.*)

4
 5 **MEMORANDUM OF LAW**

6 Mr. Easterday must pay restitution to Tyson pursuant to the Mandatory
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 8 Victim Restitution Act ("MVRA"), 18 U.S.C. § 3663A *et seq.* Under the
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 10 MVRA, which applies "in all sentencing proceedings for convictions of . . . an
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 12 offense . . . under this title . . . including any offense committed by fraud or
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 14 deceit," 18 U.S.C. § 3663A(c)(1)(A)(ii), the Court must order restitution to each
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 16 victim in the full amount of the victim's losses, 18 U.S.C. § 3664(f)(1)(A).
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 18 Because "[t]he purpose of restitution is to put the *victim* back in the position he
 19
 20 or she would have been but for the defendant's criminal conduct," *United States*
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 22 *v. Gossi*, 608 F.3d 574, 581 (9th Cir. 2010), the "amount of restitution is limited
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 24 to the victim's 'actual losses' that are a direct and proximate result of the
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 26 defendant's offense," *United States v. Thomsen*, 830 F.3d 1049, 1065 (9th Cir.
 27
 28 2016) (quoting *United States v. Eyraud*, 809 F.3d 462, 467 (9th Cir. 2015)).

29 "If the victim's losses are not ascertainable by the date that is 10 days prior
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 31 to sentencing, . . . the court shall set a date for the final determination of the
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 33 victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. §
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 35 3664(d)(5). However, the 90-day time frame is not jurisdictional and the Court

1 has discretion to schedule a separate restitution hearing beyond 90-days. *United*
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 3 *States v. Moreland*, 622 F.3d 1147, 1172 (9th Cir. 2010); *accord Dolan v.*
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 5 *United States*, 560 U.S. 605, 611 (2010).

6 “Actual loss” under the MVRA takes into account offsets associated with
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 8 benefits received by the fraud victim. Actual loss is “the difference between ‘(1)
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 10 the loss [the victim] incurred because of the unlawful conduct, [and] (2) the loss
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 12 the [victim] would have incurred had [defendant] acted lawfully.” *United States*
 13 *v. Gagarin*, 950 F.3d 596, 607 (9th Cir. 2020) (quoting *United States v. Bussell*,
 14
 15 504 F.3d 956, 965 (9th Cir. 2007)). “[I]n the context of restitution awards, the
 16
 17 government’s evidence of actual loss must deduct any financial benefit realized
 18 by the victims of the fraud.” *United States v. Price*, 2020 WL 7647368, at *3
 19
 20 (D. Mont. 2020) (quoting *United States v. Dokich*, 614 F.3d 314, 321 (7th Cir.
 21
 22 2010)); *accord Robers v. United States*, 572 U.S. 639, 641 (2014) (in mortgage
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 24 fraud prosecution, “a sentencing court must reduce the restitution amount by the
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 26 amount of money the victim received in selling the collateral”); *see also United*
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 28 *States v. Hansen*, 498 F. Supp. 3d 1332, 1344 (D. Idaho 2020) (defendant’s
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 30 company underbilling to victim credited against restitution as “[t]he intent of
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 32 restitution is ‘to make victims of crimes whole,’ . . . and not to give victims of
crime a payout”); *United States v. Rivera*, 686 Fed. Appx. 470, 472 (9th Cir.

1 2017) (“Restitution under the Mandatory Victims Restitution Act, . . . must
 2 reflect the victim’s actual loss, . . . so if the advertisements had any value to the
 3 government, that amount would need to be offset against the restitution
 4 award.”); *United States v. Lotze*, 192 Fed. Appx. 598, 601 (9th Cir. 2006) (“The
 5 district court stated at sentencing that the restitution award to Concord in the
 6 amount of \$9,026.50 ‘shall be made subject to any offset for profits earned by
 7 Concord for the sale of the toys.’”).

8 The Court “is to resolve disputes as to the proper amount of restitution by a
 9 preponderance of the evidence.” *Gagarin*, 950 F.3d at 607 (citing 18 U.S.C. §
 10 3664(e)). “Although the Government bears the initial burden of proving the loss
 11 amount, ‘[t]he question of who bears the burden for establishing a right to
 12 statutory offset is . . . left to the court’s determination of what justice requires.’”
 13 *Gagarin*, 950 F.3d at 608 (quoting *United States v. Crawford*, 169 F.3d 590, 593
 14 n.2 (9th Cir. 1999)). As such, the Court may require either Mr. Easterday or the
 15 Government to establish the appropriate net “actual loss” as “justice requires.”

16 In the situation at hand, Tyson’s “actual loss” under the MVRA must take
 17 into account financial benefits Tyson received based upon the totality of its
 18 business dealings with Mr. Easterday and/or Easterday Ranches. This includes,
 19 as identified above, funds Tyson received or retained associated with: (1) over

1 \$11,970,000.00 in unpaid feed and cattle care services; (2) over \$51,000,000.00
 2
 3 in interest and guaranteed funds received from Easterday Ranches in violation of
 4
 5 the Packers and Stockyards Act of 1921, and (3) approximately \$100,000,000.00
 6
 7 for the use of Mr. Easterday's name and likeness absent compensation to Mr.
 8 Easterday. (*See* Oreskovich Decl. at ¶¶ 5-7.) If these offsets were applied, the
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 10 amount of restitution due and owing to Tyson would only be approximately
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 12 \$7,500,000 of the original \$233,008,042 contained in the Plea Agreement.
 13 (*Compare* Oreskovich Decl. at ¶¶ 5-7, *with* ECF No. 10 at 12.)

14
 15 All three of these categories of funds received by Tyson were associated
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 17 with their business relationship with Mr. Easterday. (*See* Oreskovich Decl. at ¶¶
 18 5-7.) Mr. Easterday is entitled to an offset in restitution regarding these three
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 20 specific benefits obtained by Tyson, along with others as may be further
 21
 22 established. *See Gagarin*, 950 F.3d at 607; *Hansen*, 498 F. Supp. 3d at 1344.

23 CONCLUSION

24
 25 Based upon the foregoing, Mr. Easterday respectfully requests that the
 26
 27 Court continue the restitution determination for at least 90-days after Mr.
 28
 29 Easterday's Sentencing Hearing for determination of Tyson's actual loss.

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1 RESPECTFULLY SUBMITTED this 26th day of September, 2022.

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3 ETTER, McMAHON, LAMBERSON,
4 VAN WERT & ORESKOVICH, P.C.
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6 By: /s/ Carl J. Oreskovich
7 Carl J. Oreskovich, WSBA #12779
8 Attorney for Defendant Cody Easterday
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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of September, 2022, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to all of the attorneys that have appeared in this case and have registered with the CM/ECF System.

EXECUTED this 26th day of September 2022 in Spokane, WA.

By: /s/ Carl J. Oreskovich
Carl J. Oreskovich